PUBLIC BANK BHD.

v.

EMPORIUM TEWONG SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
13 FEBRUARY 1991

CIVIL PROCEDURE: *Omission to include costs and damages in consent order - Inadvertance by Counsel - Discretion of Court - Whether should be set aside - Rules of the High Court 1980, O. 20 r. 11.*

The first defendant, D1, executed three charges in respect of three pieces of land to the plaintiff bank. The second defendant, D2, was a tenant on the said property. As D2 had defaulted in the payment of the loan sums the plaintiff had served a Notice in Form 16D under the NLC and D2 had failed to comply with the said notice. Thereon the plaintiff by originating summons prayed for vacant possession and that the property be sold by auction.

D2's application to intervene was allowed by the Court. The plaintiff then applied to set aside the order.

On the date of hearing of the plaintiff's application, the Court was informed that D2 had by consent agreed to deliver vacant possession but that a dispute as to costs and damages had arisen as the consent order did not provide for damages and costs.

Held:

[1] Although the consent order did not mention damages or costs, D2 was aware that they must pay damages as the plaintiff had indicated that they wanted costs and damages. From the above it was clear that the question if costs and damages were at all times within the contemplation of the parties.

[2] Further as the plaintiff had agreed to allow time for D2 to vacate the premises it was highly unlikely that the plaintiff would be willing to let D2 occupy the premises without paying any rentals.

[3] It was also worthy of notice that from the time the plaintiff served Form 16J on D2 indicating that they pay the rentals directly to the plaintiff, D2 ignored the notice and persisted to negotiate with the plaintiff on their own terms.

[4] The plaintiff had a right to claim damages and costs and they had conveyed to Counsel for the 2nd defendant before the consent order was made. It was clearly an accidental omission on the part of the plaintiff and their advisers.

[5] The said omission could be corrected under O. 20 r. 11 as the discretionary power of the Court to correct clerical mistakes or accidental slips extend not only to those made by ministerial officers of the Court but also those made by a party or his advisers.

[6] It was not appropriate for the Court to correct or set aside the consent order as the plaintiff's application only sought rentals.

[The application of the plaintiff is dismissed with liberty to to file a fresh action for rentals and costs.]

Cases referred to:
In Re Craigmyle v. Inchcape [1942] 1 Ch 394 ***(foll)***
Hickman v. Berens [1895] 2 Ch 638 ***(foll)***
Wilding v. Sanderson [1897] 2 Ch 534 ***(foll)***
Lee Wah Loy v. Ng Weng Fook [1984] 2 CLJ (Rep) 158 ***(foll)***

Legislation referred to:
National Land Code 1965, ss. 226(1), 254
Rules of the High Court 1980, O. 20 r. 11

For the plaintiff - Bahma Sivasubramaniam; M/s. Hamzah Abu Samah & Partners
For the applicant - Gurubakash Singh; M/s. Gurbakash & Tan

JUDGMENT

Lim Beng Choon J:

At the outset I must mention that this is an unusual case and a brief account of the facts which are not disputed is necessary to be stated in order to appreciate the reason for the plaintiff making an application to claim damages from the 2nd defendant.

On 19 December 1986, the plaintiff filed an originating summons, that is, OS No. F31-4235-86 with a supporting affidavit in which it was alleged that Emporium Tewong Sdn. Bhd., the defendant in this action, had executed three charges in respect of three pieces of land (hereinafter referred to as 'the property') to the plaintiff and that the said Emporium Tewong Sdn. Bhd. was served with a Notice in Form 16D under s. 254 of the National Land Code 1965 and that the said Emporium had failed to comply with the said notice. The plaintiff therefore prayed for an order *inter alia* that the said property be sold by public auction to satisfy the sum due to the plaintiff. Before OS No. F31-4235-86 could come on for trial the plaintiff filed this originating summons on 4 December 1987, with a supporting affidavit in which similar allegations were made about the defendant having defaulted in the payment of the loan sums under the three charges of the same three pieces of land and that the defendant had been served with Form K under the National Land Code for the delivery of vacant possession of the said three pieces of land to the plaintiff. The plaintiff in this originating summons therefore prayed that the defendant be directed to deliver vacant possession forthwith to the plaintiff. On 9 April 1988, the plaintiff's Originating Summons No. F31-4235-86 came on for hearing and the Court ordered *inter alia* that the property be sold to satisfy the sum due to the plaintiff. On 19 August 1988, the present originating summons of the plaintiff then came on for hearing. The defendant and its Counsel were absent though duly served with the notice to hear this originating summons. This Court therefore directed *inter alia* that the defendant forthwith delivered vacant possession of the said property to the plaintiff. On 24 January 1989, Tewong Supermarket Sdn. Bhd. filed an application by summons-in-chambers with a supporting affidavit alleging *inter alia* that since June 1986 and up to date of the filing of their application they were in possession of the said property and prayed that they be allowed to enter an appearance and to intervene and contest this action to protect their rights. It was also alleged that the plaintiff consented to Tewong Supermarket Sdn. Bhd. taking the tenancy of the said property. This Court on 28 January 1989, allowed Tewong Supermarket Sdn. Bhd. to be added as 2nd defendant in this action to contest this action. An application was also made by the 2nd defendant to stay all proceedings. On 3 February 1989, the plaintiff applied by summons-in-chambers to set aside the order of this Court dated 28 January 1989. In their supporting affidavit it was alleged *inter alia* that at no time was the application of the 2nd defendant to intervene served on the plaintiff and that the 2nd defendant had no right to intervene as whatever tenancy agreement they had executed

was done between them and the defendant. Furthermore not only was the tenancy not registered under the National Land Code 1965, the plaintiff had also never consented to the tenancy agreement pursuant to s. 226(1) of the National Land Code 1965. The plaintiff however admitted that after filing their Originating Summons F31-4235-86 for sale of the said property by public auction they came to know about the tenancy agreement but not the terms and conditions of the said agreement as the 2nd defendant had refused at all material times to send to the plaintiff a copy of the agreement despite the latter's request for sight of it. On 9 February 1987, they served on the 2nd defendant a notice in Form 16J indicating their intention to enter into possession of the said property and to receive all rentals due from the 2nd defendant as tenants. However the 2nd defendant refused to comply with the notice in Form 16J and instead dictated certain terms which the plaintiff refused to accept. The plaintiff therefore withdrew the notice in From 16J and thereafter the 2nd defendant started to send to the plaintiff cheques purporting to settle the monthly rentals. It is to be noted that from the time when the 2nd defendant refused to comply with the notice in Form 16J until the withdrawal of the said notice by the plaintiff the 2nd defendant had not been paying any rent. It was only after the plaintiff had withdrawn the notice in Form 16J did they send cheques to pay not arrears of the rent but the monthly rent as agreed between the 2nd defendant and the 1st defendant in their tenancy agreement. In the meantime the said property were sold by public auction on 28 February 1989. On 25 February 1989, when the plaintiff's application to set aside the order of the Court dated 28 January 1989, came on for hearing, Counsel for the 2nd defendant submitted that as the Court had allowed the 2nd defendant to intervene he required time to file an affidavit to establish that the 2nd defendant had merits in their defence. I therefore postponed the hearing to 25 March 1989. On that date Counsel for the 2nd defendant indicated that the parties had agreed that the 2nd defendant would vacate the said property on or before 30 May 1989 and the hearing was postponed to a date to be fixed to record the terms of settlement. On 8 September 1989, the case came up for mention. Counsel for the plaintiff appeared at the hearing and she was also mentioning on behalf of the Counsel for the 2nd defendant. She informed the Court that the parties had agreed that the 2nd defendant would give up vacant possession of the property but the dispute was then over the question of costs and damages. I then suggested that the plaintiff should apply for costs and damages to be assessed since they did not pray for costs and damages in their application dated 3 February 1989, to set aside the order of the Court. The plaintiff duly applied by way of summons-in-chambers for damages and costs on 26 September 1989. When the application of the plaintiff for damages and costs came on for hearing on 3 January 1990, Counsel for the plaintiff after giving a brief history of the case said that at the second hearing of this action Counsel for the 2nd defendant informed her that they consented to vacate the said property on 30 May 1989, but they were not willing to concede to the plaintiff's application for costs and damages. Counsel for the 2nd defendant conceded that the plaintiff did say that they wanted costs and damages but the consent order for vacant possession did not mention any costs or damages. That order being a final order the plaintiff had no right to ask for costs and damages. As the parties were not able to produce the consent order granted by the Court and I felt that it was better for me to check the notes of proceedings to see what had been agreed or disagreed, and I therefore postponed the hearing to 26 January 1990. On that day Counsel for the 2nd defendant submitted that Counsel for the plaintiff had sent a draft consent order of the Court dated 25 March 1989, to Counsel for the 2nd defendant but as the 2nd defendant did not agree to that statement of the draft consent order about payment of costs and damages they duly deleted the statement and returned the amended draft order to the Counsel for the plaintiff. As there was no response from Counsel for the plaintiff, the amended draft order was duly sent to the Senior Assistant

Registrar for approval and Counsel for the 2nd defendant had extracted the order without the statement regarding costs and damages. The order was sealed by the Court on 25 March 1989. Counsel for the plaintiff on the other hand submitted that at the hearing on 25 February 1989, this Court asked Counsel for the 2nd defendant to file in a affidavit to answer the plaintiff's application to set aside the order for intervention and the case was adjourned to 25 March 1989. On that day Counsel for the 2nd defendant consented to vacant possession to be given to the plaintiff on 30 May 1989. The original order given by the Court was that vacant possession should be surrendered to the plaintiff on 30 January 1989. Because of the intervention of the 2nd defendant, vacant possession was postponed by consent to 30 May 1989. The plaintiff was therefore entitled to rentals from February 1989 to 30 May 1989. For that reason the plaintiff filed in their application for damages and costs.

From the several affidavits supporting the parties respective cases and the submissions of the Counsel acting for the respective parties it is clear to me that the plaintiff in its application dated 3 February 1989, to set aside the order of the Court of 28 January 1989, allowing the 2nd defendant to intervene and to stay the proceedings, their solicitors had inadvertently omitted to pray for damages. The 2nd defendant was aware that they must pay damages. This is supported by the statement of their Counsel when the application of the 2nd defendant for intervention was heard on 28 January 1989. At that hearing Counsel said that the 2nd defendant was prepared to pay for normal damages should there be no ground for the 2nd defendant's intervention. Furthermore when I directed that the plaintiff should make and made an application for recovery and assessment of costs and damages, Counsel for the 2nd defendant had raised no objection to my making of the order. The plaintiff duly filed their application by way of summons-in-chambers on 26 September 1989, claiming for damages and costs to be assessed. At the continued hearing of the matter on 3 January 1990, Counsel for the plaintiff submitted *inter alia* that Counsel for the 2nd defendant informed her that the latter consented to vacate the property on 30 May 1989, but Counsel for the plaintiff informed him that the plaintiff was not willing to forego their claims for costs and damages. Counsel for the 2nd defendant admitted that the plaintiff through their Counsel had indicated to him that they wanted costs and damages but according to Counsel the consent order for vacant possession was a final order and no mention of costs and damages were stated therein. From the above discussions clearly the question of costs and damages were at all times within the contemplation of the parties.

The second point which is important to bear in mind was that when at the hearing of 25 March 1989, the parties agreed to give a grace period of about two months for the 2nd defendant to vacate the property, Counsel for the plaintiff had, prior to agreeing to allow time for them to vacate the property, clearly indicated that the plaintiff should be compensated with damages and costs. It is highly incredible that the plaintiff would be willing to let the 2nd defendant occupy the property without paying any rentals bearing in mind that they were as alleged by the plaintiff occupying the property illegally. It is also worthy of notice that from the time the plaintiff served Form 16J on them on 9 February 1987, indicating that they should pay rentals to the plaintiff, the 2nd defendant ignored the notice and persisted to negotiate with the plaintiff on their own terms. It was not until 29 September 1987, when the plaintiff served Form 16K on them that they started to pay the monthly rentals which the plaintiff rightly rejected as the 2nd defendant made no attempt to pay the arrears of the rentals from 9 February 1987 to 29 September 1987, a period of over 7 months within which they occupied the property as tenants without paying a cent for rentals. Now the plaintiff is only asking the 2nd defendant to pay rentals for the grace period in which they were allowed to occupy the property which come to about 3 months' rentals. Surely the plaintiff has the

right to do so and this claim has been conveyed to Counsel for the 2nd defendant before the consent order was made. It is therefore a clear accidental omission on the part of the plaintiff and their advisers not to include an order for payment of costs and rentals in the consent order.

From the above discussions I am fully satisfied that the said omission could be corrected under O. 20 r. 11 of the Rules of High Court 1980 which reads:

> Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by summons without an appeal.

It is to be noted that this rule applies in cases where there is a clerical mistake in the judgment or order or an error arising from an accidental slip or omission. The discretionary power of the Court to correct clerical mistakes or accidental slips extend not only to those made by ministerial officers of the Court but also those made by a party or his advisers. Thus in *In Re Craigmyle v. Inchcape* [1942] 1 Ch 394 Norton J allowed the judgment to be corrected to include an order for payment of costs when the Counsel for the plaintiff accidentally omitted to ask for costs. In the present case therefore I could have allowed a correction of the judgment to add in a claim for costs and damages. In any case I am satisfied that Counsel on both sides are not *ad idem* in respect of the consent judgment which does not include an order for costs and damages. In the circumstances I could have set aside the consent judgment. Thus in *Hickman v. Berens* [1895] 2 Ch 638 where it was stated *inter alia* that where acting upon general instructions given by a client to his Counsel to compromise under a misapprehension such as where Counsel on both sides were not *ad idem* neither the Counsel nor the client was bound by the compromise and the Court would set it aside. The proposition in the *Hickman* case was approved by the Court of Appeal in *Wilding v. Sanderson* [1897] 2 Ch 534.

Although I could have corrected or set aside the consent judgment I did not do so because since the plaintiff in only asking for rentals from 25 February 1989 to 30 May 1989 the plaintiff's application for damages and costs to be assessed is not appropriate. Hence I dismissed the application but with liberty for the plaintiff to file a fresh action for rentals and costs. I am of the view that there is no legal inhibition against the plaintiff filing a fresh action to set aside the consent judgment and to claim for rentals and costs - See: *Lee Wah Loy v. Ng Weng Fook* [1984] 2 CLJ (Rep) 158.

For the above reasons the objection of the 2nd defendant was rejected and I allowed the plaintiff to file a fresh action to set aside the consent judgment and to claim for the arrears of rentals and costs.

Also found at [1992] 1 CLJ 499